82-926

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN THE INTEREST OF
C. and K.
Children

Appeal from Iowa Supreme Court

JURISDICTIONAL STATEMENT

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Pursuant to Rules 13(2) and 15 of the Rules of The Supreme Court of The United States, appellant Cheryl Clause St. Marie, files this statement of the basis upon which it is contended that The Supreme Court of The United States has jurisdiction to review by way of appeal the judgement entered by The Iowa Supreme Court in this case.

QUESTIONS PRESENTED BY APPEAL

I. Does the Due Process Clause mandate a Dismissal of the Petition for Termination of Parental Rights and Restoration of Custody of the children to Their Natural Mother?

II. Does Iowa Code Section 232.116(5) violate due process both on its face and as applied in that it fails to require a showing of harms?

III. Does Iowa Code Section 232.116(6) unconstitutionally Reverse the Burden of Proof?

IV. Would Termination in this case be violative of due process in that the Mother has not received effective Notice?

NECESSARY PARTIES

Necessary parties to this appeal include the Appellant Natural Mother, The State of Iowa, and the children, Christopher and Katherine Clause.

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OPINIONS BELOW

The opinion of The Iowa Supreme Court appears in 322 N.W. 2d. 76 (Iowa 1982) and is included herein as Appendix A. Also included is the opinion of the Trial Court herein as Appendix B.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action to terminate parental rights. The judgement of the Iowa Supreme Court was entered on July 21, 1982. A timely notice of appeal was filed on July 21, 1982, in the Iowa Supreme Court. See Appendix C the jurisdiction of

this Court is invoked under provisions of Title 28, *United States Code*, Section 1257(2).

STATUTES INVOLVED IN THIS APPEAL

This appeal involves the constitutionality of two (2) State Statutes: *Iowa Code*, Section 232.116(5), and *Iowa Code*, Section 232.116(6). As both Statutes are rather lengthy, they are each set forth in their entirety as appendices in this Jurisdictional Statement. *Iowa Code*, Section 232.116(5) appears at Appendix D, and *Iowa Code*, Section 232.116(6) appears at Appendix E.

STATEMENT OF THE CASE

On September 26, 1980, Christopher and Katherine Clause, the children of Cheryl Clause St. Marie (Appellant herein), were adjudged to be children in Need of Assistance, as defined at Chapter 232, *The Code of Iowa* (1979). At that time, custody of the children was removed from the natural mother, and they were placed in foster care. The basis of the States' Complaints centered around unclean living quarters, proper personal hygiene, and a failure to provide proper supervision and care. On April 22, 1981, a Review hearing was held, and placement of the children in foster care was continued.

On September 3, 1981, the State filed a Petition to terminate Parental Rights, and hearing was had on said Petition beginning on September 29, 1981. On December 21, 1981, the Trial Court entered its ruling on the Petition to Terminate Parental Rights. The Trial Court found that significant advances had been made by the natural mother since the date of the Review Hearing. The Trial Court not only dismissed the States' Petition to Terminate Parental Rights, but also ordered immediate return of the children to the custody of the mother. See Appendix B.

In reversing the Trial Court, the Iowa Supreme Court, in its de novo review of the record, based much of its evidentiary analysis on conditions as they were prior to Cheryl's more recent improvements and concluded that the State had carried its burden of clear and convincing evidence. The Court remanded the case to District Court for an Order consistent with that finding. Cheryl's consitutional challenges to the statutes in question were also turned aside, almost summarily. See Appendix A. Upon motion by Appellant, the Iowa Supreme Court stayed their decision pending outcome of this appeal.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal comes before the Court as a matter of statutory right in as much as the final decision of the Iowa Supreme Court sustained the validity of various parts of Ch. 232, The Code of Iowa (1981) challenged on Federal Constitutional grounds, Specifically the Fourteenth Amendment to the United States Constitution. Therefore, this appeal to the Supreme Court of the United States lies as a matter of right. *Huffman* v. *Pursue Ltd*, 1975, 420 U.S. 592, 95 S. Ct. 1200, 43 L. Ed. 2nd 482, rehearing denied 421 U.S. 971, 95 S. Ct. 1969, 44 L. Ed. 2nd 463.

Furthermore, due process issues are raised herein which touch the sensitive issues of home and family as set forth in *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. and 551 (1972) and more recently in *Stantosky* v. *Kramer*, ____U.S.____, 102 S. Ct. 1338, 71 L. Ed. 2nd.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the Court substantial and important issues of due process which require plena consideration, with briefs on the merits and oral argument, for their resolution. Appellant further states that this appeal is before the Court as a matter of statutory right pursuant to Title 28, *United States Code*, Section 1257(2). Dated Oct. 13, 1982.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF IOWA

IN THE INTEREST OF
C. and K.,
Children.

Filed July 21, 1982

245

67721

Appeal from Polk District Court, Vincent M. Hanrahan, District Associate Judge.

Child termination proceeding. REVERSED AND REMANDED.

Thomas J. Miller, Attorney General, John G. Black, Special Assistant Attorney General, and Brent D. Hege, Assistant Attorney General, for appellant State of Iowa.

Jerry R. Foxhoven of Critelli & Foxhoven, PC, Des Moines, for appellee mother.

Considered by Reynoldson, C.J., and LeGrand, Uhlenhopp, Harris, and Larson, JJ.

HARRIS, J.

This child termination case was brought pursuant to section 232.116(5), The Code 1981. As often happens, the interests of the childrens' mother, herself a child victim of poverty and neglect, are pitted against the needs of her two children. The trial court held that the State failed in its burden to show by clear and convincing evidence that the children could not be returned to their mother's custody. § 232.116(5)(c), The Code. On our

de novo review we conclude the State carried its burden. We think irreparable harm would certainly befall the children if they were entrusted to their mother. This conclusion requires us to consider and reject the mother's constitutional challenges to the termination proceeding. We reverse the trial court.

We should note that there is no appeal from that part of the trial court order which terminated the parent-child relationship between the children and their respective fathers. In each case the father had never had contact with the child and was rightly adjudged to have abandoned them. Only the relationship with the mother is involved in this appeal.

Tragedy and poverty generally go hand in hand in factual recitations in parent-child termination proceedings. Even so the facts here are exceptionally pathetic. The mother expresses a strong desire, which we accept as sincere, to regain custody of her children. Her shortcomings lie not with her wishes but in her indolence and woeful lack of inherent capacity. Though she wishes she could, she simply cannot function as a rational adult and mother. To whatever extent her surroundings have been made livable, even sanitary, all credit must go to the considerable efforts of the department of social services in Polk County. These efforts, attempting to mold the appellee into a functioning adult and mother, have been herculean, long suffering, and fruitless.

The two children, Christopher, born August 10, 1978, and Katherine, born November 24, 1979, were adjudged to be in need of assistance in an order entered September 26, 1980. The basis of the adjudication for Katherine was section 232.5(5)(b), The Code. For Christopher it was sections 232.2(5)(b) and (g), The Code. In transferring custody of children to the department of social services the trial court detailed the conditions which necessitated their removal:

> Allowing the children to live in a residence where

chickens and pigs are raised, where it is extremely dirty and filthy with cockroaches, where the children have inadequate meals prepared, where the natural mother fails to provide adequate food due to spending money on other items, where animal feces is commonly found on the floors and in the vicinity where the children play, where the children are allowed to retrieve candy from animal feces and continue eating the candy, where a chicken was trying to pick the scab off the head of one of the children while the child was sitting on the floor, where marijuana is found in the house together with a hash pipe, where the children sleep on mattresses that are wet and soaked with urine, living in a home where there are no diapers, bottle brush, toilet paper, wash rags and towels, sheets, soap, shampoo, table, highchair, curtains, pillows, mattress cover, where one of the children defecated in the tub while the child was receiving a bath and the tub was not cleaned for a week, where the mother took a wash cloth and wiped feces from the leg of one of the children and then immediately wiped his face with the same wash cloth, where the children are found with impetigo, nutritionally deficient with numerous insect bites and smelling dirty with a urine odor and diaper rash, where rotten meat has been found in the refrigerator, where the children have been put in the bathtub with water and the mother has left the room, where one of the children was admitted to the hospital for failure to thrive with maternal deprivation.

The described conditions were those in the home of Cheryl's mother, with whom Cheryl resided at the time. In these proceedings, and on this appeal, it is strenuously contended in behalf of Cheryl that these conditions no longer exist for her,

now that she lives apart from her mother. It is pointed out that Cheryl's shortcomings differ vastly from the shortcomings of her mother and that the contrast must be credited as improvement. Resolution of the requirements of the statute is however not that simple. Cheryl's tragic background is only background. It does not mark a starting point from which any improvement would call for a safe return of her children. Children's safety cannot depend on so fragile a thread. It will not satisfy the statute to move merely from degradation to an environment still dangerously unsafe for children.

I. As an essential element to establish ground for termination the State must show "there is clear and convincing evidence that the child cannot be returned to the custody of his or her parents . . . ." § 232.116(5)(c), The Code. We have long adhered to the clear and convincing evidence standard. *In Interest of Dameron*, 306 N.W. 2d 743, 744 (Iowa 1981). The clear and convincing evidence standard is a requirement under the United States Constitution. *Santosky* v. *Kramer*, U.S., 102 S. Ct. 1338, 71 L. Ed. 2d 599 (1982).

Doctor Herbert L. Notch, a clinical psychologist, conducted extensive tests and evaluations of Cheryl. Understandably, he found Cheryl to be notably depressed. She does not look on life's situations quickly enough to deal with them effectively. She has a lack of insight and poor impulse control which prevent her from dealing realistically with social limits. Significantly, she has a low self-concept and body concept. Testifying of Cheryl's histrionic disorder the doctor said:

> A. It has to do with over-reaction to normal situations where the limited insight and inability to assess the situation in ordinary terms of understanding would suggest that the patient might react with an excess of anxiety and consequently behavioral outcomes would be changed.
>
> Q. Going back for a second to the borderline

functioning findings, Dr. Notch, are you able to determine from your testing about what level this individual was functioning intellectually?

A. That's difficult to assess, because the standard deviation on any of the intellectual testing done is ten points either way, either side of a score. So that on a given test, you couldn't really use a specific score and say that it is accurate within more than about ten points either way.

Q. From all of your tests taken together, would you be able to make a finding or a statement regarding at what level you would believe this person to be functioning?

A. Borderline intellectual functioning.

Q. But you could not assign, like, an average level to that; is that correct?

A. No. I would expect generally with borderline functioning depending on the person's environment assets and stimulation from early childhood and gross experience, that would change.

Q. Is intellectual — borderline intellectual functioning itself likely to change much during a person's lifetime? A. That's generally an irreversible concept.

Q. Are the conditions which result from that, such as I believe you say problems with abstracting and poor impulse control, are they also unlikely to change?

A. They can change with training and behavior management, but they would not change from an impetus from within the person.

Q. Are you saying there would have to be some outside control?

A. Generally speaking, yes.

Q. Would that have to be ongoing probably?
A. At least in a monitoring sense.

A parade of witnesses validated Dr. Notch's dismal observations. Cheryl could not be driven, even by way of two written contracts with social workers, to bathe regularly. Her personal hygiene was deplorable. She often slept in her clothes and was most indiscriminate about whom she slept with. We choose not to repeat in this published opinion the specific details of this unfortunate young woman's lack of hygiene. It seems unfair to do so. It should be sufficient to say that among all the alarming facts in this record we find her uncleanliness especially depressing.

Cheryl shared a number of apartments with various persons, more often male than female. During a five-month period following the time the children were removed from her she seems to have moved no less than six times. During this time, as will later be explained, Cheryl was furnished a myriad of welfare services, including those of a housekeeper. The housekeeper was to help clean the various apartments and instruct and train Cheryl to do so. This proved an impossible burden. Except for the efforts of the housekeeper, one of Cheryl's male companions, and those who may have cleaned the various apartments immediately before Cheryl moved into them, Cheryl's surroundings seem always to have been uniformly filthy. Upturned ashtrays, cans, and various debris were often found on the floor, dirty dishes uniformly were found in the sink, spoiled food was on top of the counter of the kitchen, and dirty laundry in the clothing basket. In addition to whatever other deficiencies from which Cheryl suffers, an overriding one seems to be that of marked indolence. Notwithstanding continued efforts by the welfare officials and helpers, and although Cheryl must have somehow realized the stakes were very high, it was impossible to persuade Cheryl to get out of bed in the

morning, to bathe, and to take out the garbage.

At the beginning of the period following the removal of the children those assigned to the social services department began an intense program intended for Cheryl's habilitation. Many programs and services were offered her. At the beginning a number of services had already been provided for Cheryl for a period of almost two years by several agencies. For example Cheryl's homemaker, whose testimony has already been reflected in our findings, was already working with Cheryl. She also had a "protective payee," a person from the department of social services who oversaw Cheryl's financial aid, making sure the money was disseminated correctly. Cheryl has also been working off and on with the public health nurse. She had the services of what is called a family counselor, whose basic job it was to help coordinate the services already involved. The family counselor would meet with Cheryl to help her work through any difficulty.

Cheryl also had a case manager from the department whose function was to oversee all services provided throughout the community and to make sure that community services she needed were being provided. The department initiated the help of a volunteer from juvenile court who was a person willing to help monitor Cheryl's progress in the home. There was obvious concern for Cheryl's care of children and a fear that it was inadequate and that the children were not safe. The volunteer was employed to make frequent visits in Cheryl's residence to spend time with her, to talk with her, to help her play with the children, and to be of what service she could. The service of a day-care home was provided for Christopher at least after the birth of his little sister to help ease the burden on Cheryl.

This myriad of services was provided and continued up until the birth of Katherine, the second child. All services were intended to give Cheryl guidance, teach her such specific basic things as feeding the children, and the importance of proper

diet, diaper changing, and how to bathe a child. The goal was to help her get her life together, to teach her how to be a housekeeper, how to nurture the children, and to be receptive to them.

Later services, offered during the year following the children's removal, included an urban campus where Cheryl could go to school. She had the advantage of a child guidance center and was offered the advantage of parent's growth pattern classes. There were a total of about seven or eight different agencies that worked with Cheryl during the period prior to and following the children's removal.

In order that Cheryl might have some understanding of the improvement to be expected from her the department entered into successive contracts which listed fundamental duties she was supposed to perform in the home. The first was entered near the time the children were removed. When no significant change had resulted from the department's efforts a second was entered, January of 1981. Both contracts called for such fundamentals as a demand that Cheryl keep the floors clean, and to do those basic, specific things which simple sanitation would demand. But there was no improvement in sanitation. Cheryl's homemaker instructed her to keep food in a sanitary condition. Leftovers, she was told, should be kept covered. But this was not done, even in an apartment so full of cockroaches that they would crawl into food inside the refrigerator. The homemaker testified that at times food was rewarmed with cockroaches in it.

It was in the hope of drawing more particular attention to these deficiencies that the second contract was entered. These was increasing concern with Cheryl's lack of personal hygiene and that she was never out of bed before the homemaker came and usually had the clothes on that she slept in. Cheryl would have nothing done before the homemaker came. In the hope it would help develop Cheryl's sense of responsibility the second

contract provided that she was to have some specified things completed before the homemaker came. She was supposed to have a bath and have clean clothes on, to have the bed made, and the garbage of the night before removed. Cheryl continued to be personally unclean with a strong body odor as late as ten o'clock in the morning.

Even under the second contract, Cheryl became no more responsible. There was some hope that she felt somewhat better about herself but no indication that she was in a position to help cope with life more effectively.

Cheryl relates more to men than with women and a number of her apartment moves seemed to have been with the purpose of being cared for by unattached males. The department personnel were exasperated because, upon these moves, Cheryl would not inform them and contact with her was continually lost. Quite suddenly Cheryl married a young man to whom she remained married at the time of the termination hearing. This marriage was unexpected by any of the personnel because Cheryl had not mentioned the groom in any prior conversations about her apartment companions. Cheryl's husband did not testify at the proceeding. Cheryl stated he is in the navy and supports her wish to regain custody of the children. However we have no reliable knowledge about him, his abilities, or interest in the children, or lack of it.

Cheryl's situation and surroundings pose a danger to the children. Notwithstanding all the help she had been receiving there was a very real threat to them. Katherine was ten months old at the time and was in deplorable condition, unhealthy as well as unclean. An examining doctor felt the child was maternally deprived. Christopher's development was dangerously delayed. The physical condition reflected their surroundings.

The improvement of the children under foster care has been dramatic. They have grown, gained, and now appear to be

normal, happy children.

Cheryl testified in support of her desire for return of the children. She said her serviceman husband was in Florida where she would move and assured the trial court that she would contact someone for homemaker services in Florida. When asked why she responded: "A. Why? to help, to come to see if — come and see how I am doing. Q. So you don't feel capable of doing it on your own? A. Yeah. Q. So why would you contact a homemaker service? A. Because everybody needs help."

We in no way doubt Cheryl's sincerity in wishing to be a mother for her children. She exercised every opportunity available to her to visit with them. She complains that the fact that they were in foster care denied her a chance to develop parenting skills. But the plain truth is that Cheryl lacks the innate ability and cannot acquire the capacity to function as a mother. In every way the children do and perform better without than with her. The obvious danger and damage to the children upon a return appears clearly and convincingly; in fact it appears conclusively on this record.

If it can be imagined or even hoped that Cheryl might one day develop enough rudimentary skills to function adequately there is no way this could be done in time for these children. The precious and crucially important days of childhood move inexorably. Nature allows no continuances. We have said many times that children cannot wait to grow up. Tragic and pathetic as these circumstances are for Cheryl, and harsh though the result surely must seem to her, the disaster that would result to the children upon return is too obvious for us to ignore. The State has more than borne its burden of proof.

II. Because its findings of fact were opposite those we reached upon our de novo review the trial court did not address Cheryl's constitutional challenge to the termination statute. It is

of course necessary for us to do so. Relying largely on *Alsager* v. *District Court of Polk Cty., Iowa*, 406 F. Supp. 10, 16 (S.D. Iowa 1975), *affirmed in part*, 545 F.2d 1137 (8th Cir. 1976), Cheryl argues that the termination statute is unconstitutional on its face and as applied. We need consider only Cheryl's challenge that the statute is unconstitutional as applied to her. If it is constitutional as to her she has no standing to complain that it might be unconstitutional to others. *City of Des Moines* v. *Lavigne*, 257 N.W.2d 485, 486 (Iowa 1977). It is axiomatic also that if the statute is constitutional as to Cheryl it cannot be facially unconstitutional. This is because to be facially unconstitutional it must be found that the statute cannot be constitutionally applied to any factual situation, including Cheryl's. Antieau, Modern Constitutional Law, § 15:36, p. 698.

Cheryl contends our termination statute violated due process for its failure to require a showing of harms. We deny that it is subject to this infirmity. We interpret it to require the sort of showing Cheryl complains it lacks. We have said economic and cultural advantages elsewhere do not tip the balance from the home of natural parents in favor of someone else. "Courts are not free to take children from parents simply by deciding another home offers more advantages. [Authority.]." *Matter of Burney*, 259 N.W.2d 322, 324 (Iowa 1977). *See also Matter of Guardianship of Sams*, 256 N.W.2d 570, 573 (Iowa 1977).

We have previously noted that sections 232.116(5), 236.102(6), and 232.2(5) do in fact require a showing by clear and convincing evidence. We acknowledge that this is a mandate of the due process clause of the Fourteenth Amendment before the termination of parental rights. *In Interest of Chad*, 318 N.W.2d 213, 219 (Iowa 1982). Insofar as Cheryl argues that these statutes are unconstitutional as applied for failure of this burden, the argument fails upon our finding that the State did meet that burden. Cheryl also contends that section

232.116(6) is unconstitutional on its face because, she says, it unconstitutionally reverses the burden of proof. We deny that the statute does such a thing; it does not relieve the State of any burden. The burden of the State remained, and was borne throughout the proceedings, as required by the statute.

Cheryl argues that termination would be unconstitutional because the State relied on conditions in the termination proceeding which were different from those relied on by the trial court in the prior CHINA adjudication. The contention is unsound. Although Cheryl can point to the fact that livestock existed in her mother's home, and did not in her own or her boyfriend's apartments, it was not essentially the presence of livestock which brought about the CHINA order. It was the over-all lack of sanitation, hygiene, cleanliness, and parental adequancy that pervaded this pathetically unfortunate mother throughout the three years of fruitless efforts by the department of social services.

Cheryl's challenges to the constitutionality of the termination statute are without merit.

The judgment of the trial court is reversed and the case is remanded for an order terminating the relationship between Cheryl and the children.

REVERSED AND REMANDED.

APPENDIX B

Filed in the District Court of the State of Iowa in Polk County, on December 21, 1981:

REBECCA A. BELCHER, ASSISTANT POLK COUNTY ATTORNEY	)	
IN THE INTEREST OF	)	JUVENILE NO. 3948-8
CHRISTOPHER CLOUSE and KATHERINE CLOUSE	)	FINDINGS AND ORDER
Children	)	

Now, on this 18th day of December, 1981, this matter having come on for hearing on the petition to terminate parental rights on September 29 and 30, 1981, and October 9 and 26, 1981, with the children in interest not being present in court in person, but appearing by their guardians ad litem, Victoria Meade and Ted Marks. Also present were Cheryl Clouse, mother of the children, with her attorney, Jerry R. Foxhoven; Rebecca A. Belcher, Assistant Polk County Attorney; Teresa King and Jeff Maguire, Probation Officers, Polk County Juvenile Court; and Connie Mitchell, Polk County Department of Social Services. The Court, having inspected the file, finds that Duane Robinson, father of Christopher Clouse, and Randy Smith, father of Katherine Clouse, were served with notice of this action and this hearing by restricted certified mail pursuant to Section 232.112(3), the Code, and the Order of this Court; that this Court has jurisdiction of the parties and the subject matter herein; and that Duane Robinson and Randy Smith have failed to appear and are declared in default, and their defaults entered of record.

This case having proceeded to trial, the Court having heard

and considered the evidence, finds that all parties present stipulate and admit to the truth and correctness of Paragraphs 1 through 10 of the petition to terminate parental rights.

The child in interest, Christopher Clouse, was born August 10, 1978, to Cheryl Clouse and Duane Robinson. Duane Robinson's whereabouts are unknown. He has never had any contact with the child, Christopher Clouse, nor has he provided any support whatsoever for the child. There is clear and convincing evidence that Duane Robinson has abandoned Christopher Clouse with intent to do so within the meaning of Section 232.116(2) of the Code, and that the parental rights and relationship between parent and child of Duane Robinson with respect to the child, Christopher Clouse, should be terminated; that the termination is in the best interest of the child; and that the harm and consequence to the child in continuing the biological parent-child relationship is greater than any consequence of termination.

The child in interest, Katherine Clouse, was born March 24, 1979, to Cheryl Clouse and Randy Smith. Randy Smith has never had any contact with the child, Katherine Clouse, nor has he provided any support whatsoever for the child. There is clear and convincing evidence that Randy Smith has abandoned Katherine Clouse with intent to do so within the meaning of Section 232.116(2) of the Code, and that the parental rights and the relationship between parent and child of Randy Smith with respect to the child, Katherine Clouse, should be terminated; that the termination is in the best interest of the child; and that the harm and consequence to the child in continuing biological parent-child relationship is greater than any consequence of termination.

On September 26, 1980, Christopher Clouse was adjudicated a child in need of assistance within the meaning of Sections 232.2(5)(b) and 232.2(5)(g), the Code, 1979. On the same date Katherine Clouse was adjudicated a child in need of

assistance within the meaning of Section 232.2(5)(b), the Code, 1979. Legal custody of both children was placed in the Polk County Department of Social Services for foster care placement, and the mother was afforded the opportunity to demonstrate her parental capabilities. The children have continued to live in a foster home until this time.

The Court in its findings in the Order adjudicating the children to be children in need of assistance detailed the conditions which necessitated the removal of the children from the home.

> Allowing the children to live in a residence where chickens and pigs are raised, where it is extremely dirty and filthy with cockroaches, where the children have inadequate meals prepared, where the natural mother fails to provide adequate food due to spending money on other items, where animal feces is commonly found on the floors and in the vicinity where the children play, where the children are allowed to retrieve candy from animal feces and continue eating the candy, where a chicken was trying to pick the scab off the head of one of the children while the child was sittting [sic] on the floor, where marijuana is found in the house together with a hash pipe, where the children sleep on mattresses that are wet and soaked with urine, living in a home where there are no diapers, bottle brush, toilet paper, wash rags and towels, sheets, soap, shampoo, table, highchair, curtains, pillows, mattress cover, where one of the children defecated in the tub while the child was receiving a bath and the tub was not cleaned for a week, where the mother took a wash cloth and wiped feces from the leg of one of the children and then immediately wiped his face with the same wash cloth, where the children are found with infantigo,

> nutritionally deficient with numerous insect bites and smelling dirty with a urine odor and diaper rash, where rotten meat has been found in the refrigerator, where the children have been put in the bath tub with water and the mother has left the room, where one of the children was admitted to the hospital for failure to thrive with maternal deprivation.

The home which Cheryl and her children shared with the pigs and chickens was the home of Cheryl's mother. This apparently is typical of the way in which Cheryl was brought up. She was still a teenager when the children were removed from her. She had never been taught even the most basic fundamentals of life, such as bathing and eating properly. It could hardly have been expected that she would know how to take care of children when nobody had taught her how to take care of herself. One witness testified that Cheryl has shown a one thousand percent improvement since the removal.

Cheryl signed a parent contact on October 31, 1980 (Exhibit 8), and a second contract on January 16, 1981 (Exhibit 9). The second contract was executed because parts of the first contract were not being complied with.

The first provision of each contract concerned Cheryl's going to Polk County Mental Health for evaluation and reporting back once each week if required by the people at Polk County Mental Health to do so. Cheryl did report to Polk County Mental Health on November 12, 1980, but then made only a couple of her appointments over the next several months. She then started keeping her appointments and from July 2nd until this hearing she did a good job of keeping her weekly appointments. At first she was quite uncooperative, feeling she did not need therapy, but the witness testified that later she made some progress in accepting her responsibility as a mother and caring for the children.

The second provision of each contract concerns Cheryl working with a homemaker to improve her homemaking skills. According to the testimony of the homemaker when she first became involved with Cheryl in March, 1980, anything that could be done wrong in keeping house Cheryl did. She further testified she was with Cheryl up until September, 1980, when the children were removed and that things never improved. For the next several months Cheryl lived with several different people, and after May the homemaker never did get to work with her because of her many moves. The homemaker did testify that during this period there was some improvement, at least Cheryl had started bathing regularly.

Provision three of the contracts deals mainly with Cheryl's visitation with her children and with keeping her social worker and probation officer advised as to her whereabouts. Cheryl has taken advantage of every opportunity to visit the children. Every witness testified that there was no doubt that Cheryl loved her children and wanted to be a good mother.

Provision four of the original contract provided that Cheryl would sign releases of certain information. That apparently has been no problem.

Provision four of the second contract provided that Cheryl would attend the Child Guidance Play Group with her Children on Thursday from 12:30 p.m. to 1:30 p.m. The witness from Child Guidance testified that Cheryl became involved on January 22, 1981, and showed up for each weekly session thereafter, and that she was generally clean and appropriately dressed; that Cheryl obviously wanted to be with her children and to improve her parenting skills; that Cheryl is motivated and works very hard at it; that Cheryl changed diapers immediately when it was needed; that she always asked about any bruises and cuts or colds; that at the end of each session Cheryl was always the last parent to leave; that she has seen improvement in the goals which they have set for Cheryl, but that

Cheryl would need continued guidance with every level the children reach; and that the children look to Cheryl as a significant person, and if Cheryl were removed from their lives, there is a possibility that that would harm them.

Cheryl has lived in several different places since the children were removed. She lived with her father for awhile and with friends at other times. She has had her own apartment now for almost four months. Persons who had visited the apartment testified they found it neat and clean and an adequate place for small children.

Cheryl has demonstrated a desire to improve her parenting abilities on her own. Her stepmother has operated a child care center for 25 years, which has an average of ten children from age six weeks on up. Cheryl had been coming to the child care center for the last ten months in order that she could learn more about caring for children. The operator of the day care center testified that Cheryl works with the children and selects appropriate activities for them. She further testified that if the children were returned to Cheryl, they would be safe, and that she would personally help Cheryl with them.

Cheryl has sought out and voluntarily attended parent growth classes. The instructor testified that Cheryl comes to class clean and appropriately dressed; that she has observed when the children attend the classes and that there is good interaction between Cheryl and the children; that she did not observe anything that would indicate the children would not be safe with Cheryl; and that the children do recognize Cheryl as their mother.

On August 4, 1981, Cheryl married a young man who had recently been discharged from the Armed Services and had just reenlisted and left to report to the Great Lakes Naval Station the day following the wedding. She had lived with the young man for more than four weeks prior to the marriage, but prior to that

had not seen him for a year. Cheryl's social worker and probation officer expressed concern over the marriage to a man whom they knew nothing about, and perhaps justly so. Although Cheryl is free to marry whomever she pleased without anyone's permission, consulting these two ladies who had been working so hard to help Cheryl get her life together would in the least have been a display of good judgment on Cheryl's part. Be that as it may, the young bridegroom, although a stranger to everyone but Cheryl, cannot be presumed to be bad. He had served one hitch in the Armed Services with a performance good enough that he was accepted back to serve another hitch. He plans to make a career of the Service which would evidence some degree of stability. He has made financial provisions for Cheryl so that she is now receiving an allotment of $297 per month.

The Court cannot find by clear and convincing evidence that the children cannot be returned to the custody of their mother as provided in Section 232.102, nor that facts sufficient to terminate the parental rights of Cheryl Clouse to Christopher Clouse and Katherine Clouse have been established, and the petition should be dismissed as to Cheryl Clouse and the legal custody of the children should be returned to their mother, Cheryl Clouse.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the parental rights and relationship between parent and child of Duane Robinson with respect to the child Christopher Clouse, be and the same are hereby terminated.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the parental rights and relationship between parent and child of Randy Smith with respect to the child, Katherine Clouse, be and the same are hereby terminated.

IT IS FURTHER ORDERED that the petition to terminate parental rights be dismissed as to Cheryl Clouse, and that the

legal and actual custody of Christopher Clouse and Katherine Clouse be returned to Cheryl Clouse forthwith.

/s/ Vincent M. Hanrahan

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF IOWA

IN THE INTEREST OF C. AND K., CHILDREN.	245/67721 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Cheryl Clouse St. Marie, the natural mother of the children in interest herein and identified as Appellee in the above-captioned matter, hereby appeals to the Supreme Court of the United States from the final judgment and order of the Iowa Supreme Court in which the Court reversed the judgment of the trial court and remanded the case for an order terminating the parental rights of appellee with her children entered in this case on the 21st day of July, 1982.

This appeal is taken pursuant to United States Title 28, Section 1257(2).

/s/ J. R. FOXHOVEN

JERRY R. FOXHOVEN
Suite 500
United Central Bank Building
Des Moines, Iowa 50309
515-243-3122

Attorney for Natural Mother

CERTIFICATE OF SERVICE

I, Jerry R. Foxhoven, attorney for the Natural Mother, hereby certify that I mailed two (2) copies of the foregoing Notice of Appeal on the 21st day of July, 1982, pursuant to United States Supreme Court Rule 10.2, to the following:

Jay Sieleman and
Rebecca Belcher
Assistant Polk County Attorneys
Polk County Courthouse
Des Moines, Iowa 50309

Victoria L. Meade and
Ted Marks
Omega Place
Suite 9
86th and Douglas
Urbandale, Iowa 50322

Brent D. Hege
Assistant Attorney General
Second Floor
Hoover Building
Des Moines, Iowa 50319

/s/ J. R. FOXHOVEN

JERRY R. FOXHOVEN

CERTIFICATE OF FILING

I, Jerry R. Foxhoven, attorney for the Natural Mother, hereby certify that pursuant to United States Supreme Court

Rule 10.3, I filed a copy of this Notice of Appeal with the Clerk of the Iowa Supreme Court as well as the Clerk of the Iowa District Court for Polk County on the 21st day of July, 1982.

/s/ J. R. FOXHOVEN

JERRY R. FOXHOVEN

APPENDIX D

TEXT OF *IOWA CODE*, SECTION 232.116(5)

232.116 GROUND FOR TERMINATION. Except as provided in subsection 6, the Court may order the termination of both the parental rights with respect to a child and the relationship between the parents and the child on any of the following grounds:

• • •

5. The Court finds that:
a. The child has been adjudicated a child in need of assistance pursuant to section 232.96; and
b. The custody of the child has been transferred from his or her parents for placement pursuant to section 232.102 for at least twelve months; and
c. There is clear and convincing evidence that the child cannot be returned to the custody of his or her parents as provided in section 232.102.

APPENDIX E

TEXT OF *IOWA CODE*, SECTION 232.116(6)

6. Notwithstanding the provisions of subsections 2 to 5 the Court need not terminate the relationship between parents and child if the court finds:

a. A relative has legal custody of the child; or

b. The child is over ten years of age and objects to such termination; or

c. There is clear and convincing evidence that such termination would be detrimental to the child at the time due to the closeness of the parent-child relationship; or

d. It is necessary to place the child in a hospital, facility or institution for care and treatment and the continuation of the parent-child relationship is not preventing a permanent family placement for the child.

e. That the absence of a parent is due to the parent's admission or commitment to any institution, hospital or health facility or due to active service in the State or Federal Armed Forces.

CERTIFICATE OF SERVICE

I, Jerry R. Foxhoven, attorney for the Natural Mother, hereby certify that I mailed three (3) copies of the foregoing Jurisdictional Statement on the 13th day of October, 1982, pursuant to United States Supreme Court Rule 33(1), to the following:

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Brent D. Hege
Assistant Attorney General
Second Floor
Hoover Building
Des Moines, Iowa 50319

/s/ JERRY R. FOXHOVEN

JERRY R. FOXHOVEN

CERTIFICATE OF FILING

I, Jerry R. Foxhoven, attorney for the Natural Mother, hereby certify that, pursuant to United States Supreme Court Rule 10.3, I filed a copy of this Jurisdictional Statement with the Clerk of the United States Supreme Court by mailing forty (40) copies thereof in the United States Mail with sufficient postage thereon this 13th day of October, 1982.

/s/ JERRY R. FOXHOVEN

JERRY R. FOXHOVEN

82-926

No.

IN THE

Supreme Court of the United States

NOVEMBER TERM, 1982

IN THE INTEREST OF C. AND K.,
Children.

On Appeal from the Supreme Court of Iowa

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Does Iowa Code Section 232.116(5), which requires a showing of harm to the children as a prerequisite to termination of parental rights, deny appellant substantive due process under the Fourteenth Amendment to the United States Constitution.

2. Does Iowa Code Section 232.116(6) which permits the trial court to withhold termination notwithstanding the State's proof by clear and convincing evidence, unconstitutionally shift the burden of proof of termination of parental rights proceedings from the State to the natural parents in violation of the Fourteenth Amendment to the United States Constitution.

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IN THE

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MOTION TO DISMISS

The Appellee - State of Iowa moves the Court to dismiss the appeal herein on the ground that the appeal from a state court does not present a substantial federal question, Rule 16.1(b).

STATEMENT OF THE CASE AND STATE STATUTES INVOLVED

The statutes directly involved, Iowa Code Sections 232.116 (5) and (6) (1981), are set forth in full as Appendices D and E to the Jurisdictional Statement. Appellee believes, however, that a brief summary of the history of Iowa's juvenile justice statutes may be of assistance to the Court.

Until as recently as 1979, the juvenile laws of the State of Iowa have been subject to criticism of the same nature as has been directed at the juvenile justice system nationally. *In Re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The state statutes provided only a skeletal framework for the legal process and practices which occurred in the juvenile court. Iowa Code Chapter 232 (1977).

However, as early as 1973, the Iowa Legislature initiated an inquiry into the juvenile statutes and embarked on an attempt at a comprehensive revision of the juvenile justice code. This legislative activity resulted in enactment of a new, comprehensive juvenile justice act. 1978 Iowa Acts, Chapter 1088, Section 1, *et. seq.* The act is now codified at Iowa Code Chapter 232 (1981).

The new act is based in large part upon the enlightened standards recently promulgated for juvenile justice systems. IJA/ABA Juvenile Justice Standards (Tent. draft 1977). The act, as now written, complies with each and every pronouncement of this Court relating to juvenile justice: *Santosky* v. *Kramer,* ____ U.S. ____, 102 S.Ct. ____, 71 L.Ed.2d 599 (1982); *Lassiter* v. *Department of Social Services,* 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Fare* v. *Michael C.,* 444 U.S. 887, 100 S.Ct. 186, 62 L.Ed.2d 121 (1979); *Breed* v. *Jones,* 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975); *McKiever* v. *Pennsylvania,* 403 U.S. 528, 91 S.Ct. 647, 29 L.Ed.2d 647 (1971); *In Re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *In Re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Kent* v. *United States,* 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). The Iowa Supreme Court and Iowa Court of Appeals, since July 1, 1979, the effective date of the statutes, have taken numerous opportunities to interpret, clarify and construe the act. *In Interest of C. and K.,* 322 N.W.2d 76 (Iowa 1982); *In Interest of Chad,* 318 N.W.2d 213 (Iowa 1982); *In Interest of A.R., K.R. and A.R.,* 316 N.W.2d 887 (Iowa 1982); *In Interest of J.R. and S.R.,* 315 N.W.2d 750 (Iowa 1982); *In Interest of Dameron,* 306 N.W.2d 743 (Iowa 1981); *State Ex Rel. Leas In Interest of O'Neal,* 303 N.W.2d 414 (Iowa 1981); *In Interest of Adkins,* 298 N.W.2d 273 (Iowa 1980) (Termination of Parental Rights); *In Interest of C.T.F.,* 316 N.W.2d 865 (Iowa 1982); *In Interest of C.D.P.,* 315 N.W.2d 731 (Iowa 1982); *In Interest of Harrell,* 309 N.W.2d 896 (Iowa App. 1981); *In Interest of Matzen,* 305 N.W.2d 479 (Iowa 1981) (Delinquency);

In Interest of Leehey, 317 N.W.2d 513 (Iowa App. 1982); *In Interest of Long,* 313 N.W.2d 473 (Iowa 1981); *In Interest of Driver,* 311 N.W.2d 87 (Iowa 1981); *In Interest of Blackledge,* 304 N.W.2d 209 (Iowa 1981); *In Interest of Wall,* 295 N.W.2d 455 (Iowa 1980); *In Interest of Hewitt,* 272 N.W.2d 852 (Iowa 1978) (Child in Need of Assistance - Formerly Neglect and Dependency).

It is the position of the State that the Iowa Courts have not paid mere lip service to the application of due process in juvenile proceedings, but have embraced and applied those concepts vigorously. In several areas, the Iowa Courts have extended rights beyond the pronouncements of this Court. *In Interest of C.T.F.,* 316 N.W.2d 865 (Iowa 1982) (constitutional right to speedy trial in delinquency proceedings); *In Interest of Harrell,* 309 N.W.2d 896 (Iowa App. 1981) (applies adult rule requirement of corroboration of accomplice testimony to juvenile delinquency proceedings); *In Interest of Wall,* 295 N.W.2d 455 (Iowa 1980) (declared legal ground of child in need of assistance unconstitutional as void for vagueness); *In Interest of Hewitt,* 272 N.W.2d 852 (Iowa 1978) (child in need of assistance adjudication reversed for lack of proper constitutionally required notice).

COURSE OF PROCEEDINGS
TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

This appeal by a natural mother comes from the order and judgment of the Iowa Supreme Court which judgment, upon de novo review of issues raised and preserved in the juvenile court, terminated the parent/child relationship between the appellant and her two children, C. and K.

Initially this cause of action was instituted by the filing in the Polk County, Iowa Juvenile Court of a Petition to Terminate Parental Rights. The Petition was filed on September 3, 1981 and alleged as a legal base Iowa Code Section 232.116(5) (1981). (Iowa S.Ct. App., at 4-6). That statute provides as follows:

232.116 Grounds for Termination. Except as provided in subsection 6, the court may order the termination of both the parental rights with respect to a child and the relationship between the parents and the child on any of the following grounds:

. . . 5. The court finds that:

a. The child has been adjudicated a child in need of assistance pursuant to section 232.96; and

b. The custody of the child has been transferred from his or her parents for placement pursuant to section 232.102 for at least twelve months; and

c. There is clear and convincing evidence that the child cannot be returned to the custody of his or her parents as provided in section 232.102.

Iowa Code Section 232.116(5) (1981).

The natural mother filed an answer to the Petition on September 11, 1981. (Iowa S.Ct. App., at 8). The answer admitted the allegations necessary for proof of Sections 232.116(5)(a) and (b). (Iowa S.Ct. App., at 9). She contested only the allegations of proof under Section 232.116(5)(c), that there was clear and convincing evidence that the children could not be returned to the custody of the natural mother because of a harm set out in Iowa Code Section 232.2(5) (1981). (Iowa S.Ct. App., at 9)

The trial court hearing on the termination petition was held on September 29, 30, October 9 and 26, 1981. (Iowa S.Ct. App., at 599-600). On December 21, 1981, the juvenile court filed its order and judgment which dismissed the petition as to the natural mother. (Iowa S.Ct. App., at 599-600). The court determined that the state failed to prove by clear and convincing evidence that the children could not be returned to the custody of appellee as provided in Section 232.102(6). (Iowa S.Ct. App., at 608).

Feeling aggrieved by the juvenile court order, the state appealed by filing Notice of Appeal on December 22, 1981. (Iowa S.Ct. App., at 609).

On July 21, 1982, the Iowa Supreme Court filed its decision which is set out in the Jurisdictional Statement at Appendix A. The decision reversed the lower court and held that the State proved by clear and convincing evidence that the children could not be returned to the custody of the natural mother. *In Interest of C. and K.*, 322 N.W.2d 76, 78-81 (Iowa 1982). The Iowa Supreme Court determined the continuing harm to be the natural mother's inability, despite asistance and training, to provide adequate food, clothing, shelter and sanitation for herself and the children, as well as, her lack of an intellectual functioning level necessary to provide the children with minimal supervision and protection. Iowa Code Sections 232.2(5)(c)(2) and (5)(g) (1981).

On July 21, 1982 the natural mother filed a Notice of Appeal to the United States Supreme Court. (Jurisdictional Statement, at 33).

PREVIOUS CHILD IN NEED OF ASSISTANCE PROCEEDINGS

Prior to the above-mentioned termination proceedings, these children were the subject of child-in-need-of-assistance proceedings (formerly neglect and dependency).

On September 26, 1980, both children were adjudicated in need of assistance; Katherine, D.O.B. March 24, 1979, under the legal base of Section 232.2(5)(b) and Christopher, D.O.B. August 10, 1978, by virtue of Sections 232.2(5)(b) and (g). (Iowa S.Ct. App., at 602). Legal custody was transferred to the Department of Social Services for purposes of foster care placement. (Iowa S.Ct. App., at 602). They remained in foster care until the time of termination hearing, September-October 1981. (Iowa S.Ct. App., at 602).

Between September 1980 and September 1981, the natural mother was afforded services and an opportunity to rehabilitate her parental skills to enable the children to return home. (Iowa S.Ct. App., at 633). Two contracts were executed between the mother and the Department of Social Services, setting out the conditions and expectations necessary for the return of the children to their parent. (Iowa S.Ct. App., at 604). The first was executed on October 31, 1980, with the second, more specific contract executed on January 16, 1981. (Iowa S.Ct. App., at 604).

A CHINA review hearing, mandated pursuant to Iowa Code Section 232.102(6) (1981), was held in April 1981. (Iowa S.Ct. App., at 203). It resulted in a continuation of the prior disposition and the children were not returned home.

On September 3, 1981, the petition to terminate parental rights was filed. (Iowa S.Ct. App., at 2). The filing was precipitated by the determination of various child care workers working with the family that the children could not be returned to the natural mother because of her continued inability to provide minimal food, clothing, shelter and sanitation for the children. Moreover, her continued lack of intellectual functioning rendered her unable to recognize and provide the children's base need for protection and supervision. Iowa Code Sections 232.2(5)(c)(2) and (5)(g).

FACTUAL STATEMENT

The hearing in the juvenile court on the Petition for Termination of Parental Rights occurred on September 29, 30 and October 9, and 26, 1981. (Iowa S.Ct. App., at 599-600).

The State's case consisted of the following testimony and evidence.

The appellant-state called as witnesses the following persons: Teresa King, juvenile probation officer (Iowa S.Ct. App., at 374-438); Connie Mitchell, Department of Social Services foster care worker (Iowa S.Ct. App., at 128-244); Janet Simmons, homemaker to the natural mother Cheryl (Iowa S.Ct. App., at 302-373); Celia Young, social worker at Polk County Mental Health who was a therapist to the natural mother Cheryl (Iowa S.Ct. App., at 91-127); Dr. Herbert Notch, clinical psychologist at Polk County Mental Health who conducted a psychological evaluation of the natural mother (Iowa S.Ct. App., at 23-65); Dr. Barbara Cavellin, clinical psychologist who attended Christopher (Iowa S.Ct. App., at 66-90); Linda Skeers, parenting skills in- structor for the program attended by Cheryl, the natural mother (Iowa S.Ct. App., at 439-482).

The factual testimony revealed that appellant was afforded a myriad of services during the twelve month rehabilitation period. (Iowa S.Ct. App., at 379-383, 390-406). The natural mother was afforded services under, not one, but two parenting contracts delineating corrections needed for the children to be returned. (Iowa S.Ct. App., at 389-390). During the twelve month rehabilitation period her lack of personal hygiene failed to abate. (Iowa S.Ct. App., at 186-192). The many apartments in which she resided were similarly disheveled and unsanitary. (Iowa S.Ct. App., at 308-314). Between April 1981 and the termination hearing in September 1981, the natural mother lived in six different residences. (Iowa S.Ct. App., at 172). In one, she was without any utilities for two months. (Iowa S.Ct. App., at 314-315). Testimony of a clinical psychologist detailed his clinical findings that the natural mother suffered borderline intellectual functioning, including limited insight and impulse control, notable depression and bizarre ideation and histrionic disorder. (Iowa S.Ct. App., at 23-34). He opined a resulting inability to react to normal situations, a need for continuing supervision and a "guarded" prognosis of her child care ability. (Iowa S.Ct. App., at 34-41). Child care workers corroborated

her inability to recognize and react to the children's need for supervision and protection. (Iowa S.Ct. App., at 129-133, 318-319, 383-388).

Based upon this factual proof, the Iowa Supreme Court reversed the juvenile court and entered order and judgment terminating the parent/child relationship. *In Interest of C. and K.*, 322 N.W.2d 76 (Iowa 1982).

Throughout the totality of these proceedings, the natural mother has exercised her right to counsel, right to notice and opportunity to be heard, right to access of all juvenile court records, right to confrontation, cross-examination and compulsory process, and the right to require the state's proof by clear and convincing evidence in both child in need of assistance and termination proceedings. Iowa Code Sections 232.37, .87, .88, .89, .95, .96, .111, .112, .113, .117, .147 (1981).

ARGUMENT

I. Iowa Code Section 232.116(5) Which Allows Termination Of Parental Rights Upon A Showing That, A) The Children Were Previously Adjudicated Children In Need Of Assistance, B) The Children Had Remained Out Of Parental Custody In Foster Case In Excess Of Twelve Months And C) At The Time Of Termination Hearing There Exists Clear And Convincing Evidence The Children Cannot Be Returned To Parental Custody Because Of Continuing, Substantial Harm Which Supported The China Adjudication, Requires A Showing Of Continuing Substantial Harm To The Children As A Prerequisite To Termination Of The Parent-Child Relationship And The Statute Complies With Substantive Due Process Under The Fourteenth Amendment To The United States Constitution.

The appellant-natural mother alleges the Iowa termination statute, Iowa Code Section 232.116(5), formerly Iowa Code Section 232.114(5), denies her due process under the standard articulated in *Alsager* v. *District Court of Polk County, Iowa,* 406 F.Supp. 10, 21 (S.D. Iowa 1975), *aff'd in part,* 545 F.2d 1137 (8th Cir. 1976). Although this Court has never decreed the *Alsager* standard as constitutionally required, the State assumes for the sake of argument that it has.

It is the position of the State that Iowa Code Section 232.116(5) was written to include the *Alsager* standard and, in fact, requires exactly what appellant claims it lacks; a high and substantial degree of harm to the children as a prerequisite to termination of the parent-child relationship.

In a decision of the Iowa Supreme Court previous to the instant appeal, the Court directly addressed the issue on the merits.

> [11] Trial court correctly found the first two steps in a section 232.114(5), The Code 1979, analysis had been met. Chad was in fact adjudicated a child in need of assistance and had been placed out of Malinda's custody for more

than twelve months. However, the final prong of section 232.114(5) was not met. Section 232.114(5)(c), in keeping with the fundamental right to familial integrity mentioned in section 232.1, required the court to find, on the basis of clear and convincing evidence, that the child cannot be returned to the custody of his parents as provided in section 232.102.

[12] The reference to section 232.102 creates a burden of proof problem that we have recognized, but not previously resolved. *See In re Dameron,* 306 N.W.2d 743, 744, 747 n.4 (Iowa 1981); *In re Adkins,* 298 N.W.2d 273, 278 (Iowa 1980). The problem is that section 232.114(5)(c) requires clear and convincing proof that the child cannot be returned to the custody of the parents, whereas section 232.102(6) requires that temporary placement be terminated and the child returned to his home if the court finds, by a preponderance of the evidence, that the child will not suffer harm in the manner specified in section 232.2(5). *See, e.g., In re Blackledge,* 304 N.W.2d 909, 214-15 (Iowa 1981). We resolve this conflicting standard of proof problem by holding that in the termination of parental rights context, the clear and convincing standard of section 232.114(5) prevails and applies to the showing of harm required pursuant to section 232.2(5). *In other words, before a termination of parental rights can occur under section 232.114(5), there must be clear and convincing proof that the child will suffer harm in the manner specified in section 232.2(5).* This is the minimal burden of proof now required in this type of case by the due process clause of U.S.Const. amend. XIV. *Santosky* v. *Kramer,* ____ U.S. ____, ____, 102 S.Ct. 1388, ____, 71 L.Ed.2d ____, ____ (1982). (Emphasis added.)

In Interest of Chad, 318 N.W.2d 213, 219 (Iowa 1982) [Iowa Code Section 232.114(5) (1979) now found at Iowa Code Section 232.116(5) (1981)].

The high and substantial degree of harms required are found at Iowa Code Section 232.2(5) (1981). The statute is set out in full herein at Appendix A. As rewritten under Iowa's new Juvenile Justice Act, these harms are narrowly drawn and specifically define the prohibited conduct. *Compare* Iowa Code Section 232.2(5) (1981) *with* Iowa Code Section 232.2(13) (1977); *See,* Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards,* 27 Stan.L.Rev. 985 (1975).

The State submits that Iowa Code Sections 232.116(5), 232.102(6) and 232.2(5) require the very showing of a high and substantial degree of harm to the children as a prerequisite to termination of parental rights. The Iowa Supreme Court has so found.

The issue raised by appellant fails to present a substantial federal question because the state statute requires exactly what appellant claims it should.

II. Iowa Code Section 232.116(6) Does Not Shift The Burden Of Proof In Termination Of Parental Rights Proceedings From The State To The Natural Parent But Allows The Court To Withhold A Termination Decree, Under Certain Circumstances, Notwithstanding The State's Proof By Clear And Convincing Evidence.

As a second attack upon the Iowa termination of parental rights statute, appellant alleges that Iowa Code Section 232.116(6) reverses the constitutionally required burden of proof upon the State and places it upon the natural parents in contravention of *Santosky* v. *Kramer,* ____ U.S. ____, 102 S.Ct. 1338, 71 L.Ed.2d 599 (1982).

The State contends that the statute does not in any fashion alter the burden of proof. The effect of the statute is to allow the juvenile court to withhold a termination decree, in certain

circumstances, even though the State has proven by clear and convincing evidence the three elements necessary for termination of parental rights.

Iowa Code Section 232.116(6) does not require the natural parents to come forward with proof of the circumstances enumerated in the provision. In fact, it may be the State's own evidence which allows the court in its discretion to withhold terminating the relationship of parent-child.

The Iowa Supreme Court addressed the appellant's proposition and rejected it.

> Cheryl also contends that section 232.116(6) is unconstitutional on its face because she says, it unconstitutionally reverses the burden of proof. We deny that the statute does such a thing; it does not relieve the State of any burden. The burden of the State remained, and was borne throughout the proceedings, as required by the statute.

In Interest of C. and K., 322 N.W.2d 76, 81-82 (Iowa 1982).

Appellant's argument upon this issue fails to raise a substantial federal question.

QUESTIONS NOT PRESENTED

Appellant seeks to invoke the jurisdiciton of this Court under Title 28, *USC*, Section 1257(2), where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution. The State would agree that ISSUES II and III of appellant's Questions Presented By Appeal are properly before this Court under Section 1257(2). (Jurisdictional Statement at 1).

The State would argue, however, ISSUES I and IV are not properly before this Court.

The appellant fails to cite any state statute as being repugnant to the Constitution.

The appellant, upon each of these questions, only generally alleges that in some fashion the termination proceedings in this matter violate due process.

In effect, appellant asks this Court for another factual review of the record. Upon that factual review, she would have this Court substitute its judgment for that of the Iowa Supreme Court.

It is the State's contention, that given the posture of this matter, ISSUES I and IV, identified by appellant, are not properly before this Court and, in any event, do not raise substantial federal questions.

CONCLUSION

On the basis of the foregoing authority and argument, the Appellee-State of Iowa moves this Court for an order dismissing this appeal.

Respectfully submitted,

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APPENDIX TO APPELLEE — STATE OF IOWA'S MOTION TO DISMISS

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On Appeal from the Supreme Court of Iowa

APPENDIX TO APPELLEE — STATE OF IOWA'S MOTION TO DISMISS

APPENDIX

Iowa Code Section 232.2(5) (1981)

5. *"Child in need of assistance"* means an unmarried child:

a. Whose parent, guardian or other custodian has abandoned the child.

b. Whose parent, guardian or other custodian has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.

c. Who has suffered or is imminently likely to suffer harmful effects as a result of:

1. Conditions created by the child's parent, guardian, custodian; or

2. The failure of the child's parent, guardian, or custodian to exercise a reasonable degree of care in supervising the child.

d. Who has been sexually abused by his or her parent, guardian, custodian or other member of the household in which the child resides.

e. Who is in need of medical treatment or cure, alleviate, or prevent serious physical injury or illness and whose parent, guardian or custodian is unwilling or unable to provide such treatment.

f. Who is in need of treatment to cure or alleviate serious mental illness or disorder, or emotional damage as evidenced by severe anxiety, depression, withdrawal of untoward aggressive behavior toward self or others and whose parent, guardian, or custodian is unwilling or unable to provide such treatment.

g. Whose parent, guardian, or custodian fails to exercise a minimal degree of care in supplying the child with adequate food, clothing or shelter and refuses other means made available to provide such essentials.

h. Who has committed a delinquent act as a result of pressure, guidance, or approval from a parent, guardian or custodian.

i. Who has been the subject of or a party to sexual activities for hire or who poses for live display or for photographic or other means of pictorial reproduction or display which is designed to appeal to the prurient interest and is patently offensive; and taken as a whole, lacks serious literary, scientific, political or artistic value.

j. Who is without a parent, guardian or other custodian.

k. Whose parent, guardian, or other custodian for good cause desires to be relieved of his or her care and custody.

1. Who for good cause desires to have his or her parents relieved of his or her care and custody.